

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING
EN BANC**

75-1399

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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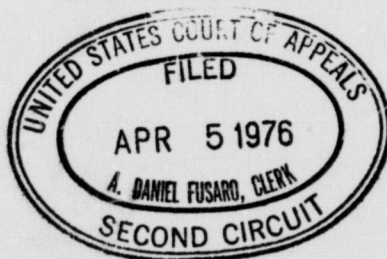
UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

WILLIAM WOOTEN,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

PETITION FOR REHEARING



HERMAN H. TARNOW
ATTORNEY FOR APPELLANT
663 FIFTH AVENUE
NEW YORK, N.Y. 10022

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee, .

-against-

WILLIAM WOOTEN,

Defendant-Appellant.

-----X

PETITION FOR REHEARING

HERMAN H. TARNOW
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663 Fifth Avenue
New York, New York 10022
(212) 355-3977

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United States v. Miranda
Dkt. No. 74-2651, Slip Op. 6545
(2nd Cir., December 3, 1975)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

WILLIAM WOOTEN,

Defendant-Appellant.

-----X

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK.

PETITION FOR REHEARING.

PRELIMINARY STATEMENT

This is a petition for a rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure of a decision of this Court dated March 19, 1976 affirming the order of the District Court entered on the 21st day of November, 1975 sentencing the defendant-appellant Wooten to concurrent terms of two years imprisonment, six months of which were to be served in a jail type institution, and the balance of which was

suspended. Wooten was also sentenced to a three year term of special parole to commence upon the expiration of his confinement.

A motion to recall the mandate issued herein; stay with reissuance pending a determination of a motion to reargue the instant appeal; and the continuance of bail pending a determination of an application to the Supreme Court of the United States by Wooten for review of the cause herein on writ of certiorari was filed with this court on the 25th day of March, 1976. Wooten is presently at liberty.

ISSUES PRESENTED FOR REVIEW.

I.

Did the Trial Court's failure to allow the jury to weigh the fact that the government could not produce documents containing information given by a key witness - co-defendant, coupled with an admission that his previous statements were false, deny Wooten a fair trial.

II.

Whether defendant Wooten was denied due process of law and the right to effective representation by the Trial Judge's hasty commencement of the trial and failure to grant defendant's request for a brief adjournment.

III.

Whether the Court's charge was so erroneous, confusing and misleading as to prohibit the jury from rendering a fair and impartial verdict.

ARGUMENT

POINT I

THE JURY SHOULD HAVE BEEN PERMITTED TO EVALUATE THE FACT THAT THE GOVERNMENT COULD NOT PRODUCE DOCUMENTS CONTAINING INFORMATION GIVEN BY A KEY WITNESS - A CO-DEFENDANT.

During the course of the oral argument on appeal, the Assistant United States Attorney, misspoke when he argued that the defense counsel in the District Court had failed to exercise an option to a hearing concerning documents which were in the possession of

the United States Attorney's office.

This simply is not the case.

"Mr. Schatz: Last night I learned for the first time that at one time there existed a U.S. Attorney interview sheet for one Randall Borchardt who will be a government witness in this case. This witness sheet was completed by Richard Weinberg, an Assistant United States Attorney in our office. Mr. Engel, who was in charge of this matter until approximately ten days ago, apprised me of the fact that he misplaced or somehow this document was no longer in his files,...Mr. Engel further stated that it was his recollection that this document merely related to questions of pedigree and that --

"Mr. Michaels: Objection. It directly contradicts what was said to me last night by Mr. Schatz.

"Mr. Schatz: ...to the best of their recollection Mr. Borchardt at that time did not make any statements with respect to this case. I should say further that no one is absolutely certain as to that fact. [Emphasis added.]

...

"The Court: I will require -- I will dispose of it very promptly. I will require the government to make available to you Mr. Schatz and Mr. Weinberg and who else allegedly -- ... will require they be made available to you for questioning in advance of

their trial testimony if anybody is going to put him on the witness stand, whether the government intends to put him on the witness stand or you do."

Thereafter, when the defense counsel offered to call these witnesses to testify concerning the document, the Court stated:

"The Court: I will not permit the jury to hear the evidence as to whether or not it was lost. You presented that matter yesterday. I made available to you all the witnesses in the case who had any knowledge of it. This is not to be tried before the jury."

This testimony may be found within the appendix filed herein, pp. A-20 through A-28.

This Court, in affirming the conviction from the bench, appeared to place emphasis upon the fact that the trial attorney had not utilized the procedure established by the District Court with respect to the lost or destroyed documents. It is apparent from the reading of this transcript that no such procedure was established and that having been given the information immediately before the openings

were made to the jury, the trial counsel was prejudiced by the denial previously made for a short adjournment in order to adequately prepare for this case.

In a recent decision of this court, United States v. Miranda, Dkt. No. 74-2651, Slip Op. 6545 (2nd Cir., December 3, 1975), great importance was attributed to the fact that a jury, as trier of fact, was made aware of the government's failure to produce a document or tape which it allegedly once had in its possession.

"The evidence concerning the tape and its loss was before the jury. Defense counsel was in a position to make the most of that evidence in summation and did so. The jury was entitled to consider such evidence in reaching its verdict. (Slip Opinion at p.6553, Emphasis Added)."

In view of the testimony at trial that this co-defendant Borchardt had repeatedly lied to the arresting officers and government officials, it is respectfully submitted that the failure to apprise the jury of the fact that a document had been either misplaced or destroyed was a significant deprivation.

of Wooten's rights to a fair trial.

POINT II

THE TOTALITY OF THE PROSECUTION WAS
SO OVERWHELMINGLY PREJUDICIAL AS TO
DENY THE DEFENDANT THE RIGHT TO A
FAIR TRIAL.

In this application for a rehearing, defendant urges upon the Court to reconsider the fact that there was a misleading charge of the Court to the jury (and a letter from a juror attempting to impeach the verdict); a denial of due process of law and the right to effective representation when the trial judge elected to commence the trial despite repeated requests for a short adjournment from the newly substituted trial counsel; the acknowledged false testimony of the special agent Greenan before the Grand Jury (transcript pp. 91-92, see Exhibit A affidavit of Herman H. Tarnow, Esq. dated March 25, 1976).

CONCLUSION

For all of the above reasons, it is respectfully submitted that this Court should grant the instant petition for a rehearing and reverse the order of the District Court.

Respectfully submitted,

HERMAN H. TARNOW
Attorney for Defendant-Appellant

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

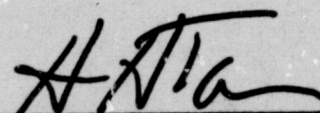
HERMAN H. TARNOW, being duly sworn, deposes
and says, that deponent is not a party to the action,
is over 18 years of age and resides at New York City.

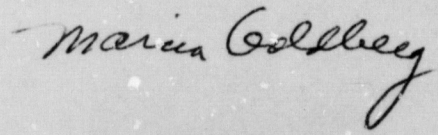
On April 2, 1976 deponent served the within
Petition For Rehearing upon the following parties in this
action at the following addresses designated by said
parties for that purpose by depositing a true copy of
same enclosed in a post-paid properly addressed wrapper
in an official depository under the exclusive care and
custody of the United States Postal Service within the
State of New York.

HON. ROBERT B. FISKE, JR.
UNITED STATES ATTORNEY
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FOLEY SQUARE
NEW YORK, NEW YORK
ATT: STEVEN M. SCHATZ, ESQ.
ASSISTANT U.S. ATTORNEY

Sworn to before me this

2 day of April, 1976.


HERMAN H. TARNOW


MARIA COLLEDGE
Notary Public, State of New York
No. 41-1186580
Qualified in Queens County
Term expires March 30, 1977

75-1399

*B
Pg 5*

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

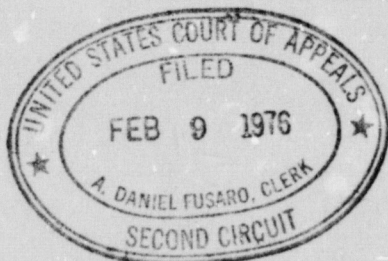
UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

v.

WILLIAM WOOTEN,
DEFENDANT-APPELLANT

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

APPENDIX



HERMAN H. TARNOW
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663 FIFTH AVENUE
NEW YORK, N.Y. 10022

PAGINATION AS IN ORIGINAL COPY

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75 CRIM. 670

D. C. Form No. 100
CRIMINAL DOCKET

JUDGE WEINFELD

TITLE OF CASE	ATTORNEYS
THE UNITED STATES	For U. S.:
US.	Thomas E. Engel AUSA 791-1929
ROMEO PETRILLO, a/k/a "Roy"-1-4 11/21/75	
MARGARET PETRILLO-1 & 4 11/24/75	
VINCENT DiDONATO-1 & 2 11/21/75	
DAVID McLEAN-1-3 11/21/75	
RANDALL BORCHARDT-1-3 & 6 11/21/75	For Defendant:
WILLIAM WOOTEN-1 & 3 11/21/75	(see separate sheet for atty's listing)
JOHN KELLEY-1 & 5 11/24/75	

ABSTRACT OF COSTS	AMOUNT	CASH RECEIVED AND DISBURSED			
		DATE	NAME	RECEIVED	DISBURSED
(07)					
Fine,					
Clerk,					
Marshal,					
Attorney,					
Constitutional Clerk 21					
Witnesses 846,812,841,(a)(1),(b).					
Consp. to viol. Fed. Narco. Laws.(Ct.1)					
Distr. & possess. w/intent to distr.					
Cocaine,II, and Marijuana,I.(Cts. 2-6)					
(Six Counts)					

DATE	PROCEEDINGS
7-7-75	Filed indictment.
7-21-75	Defts. Romeo & Margaret Petrillo...Court directs entry of not guilty plea. Bail as to Romeo Petrillo continued.(\$5,000. P.R.B.) Deft. M. Petrillo ordered photographed and fingerprinted and released on her own recognizance. Defts. Donato, McLean, Borchardt, Wooten & Kelley(attys. present) Plead not guilty. Bail continued as to all five defts. Deft. Kelley bail limits are extended to Continental U.S. Case assigned to Judge Weinfeld for all purposes. Conner, J.
07-22-75	JOHN KELLEY--Filed defts. notice of appearance by: Robert E. Levy of 1200 Memorial Drive, Asbury Park, NJ 07712

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DATE	PROCEEDINGS	CLERK'S FEES	
		PLAINTIFF	DEFENDANT
07-22-75	RANDALL BORCHARDT--Filed defts. notice of appearance by: Milton Rosenberg of 401 Bdwy, NYC 10013		
07-22-75	WILLIAM WOOTEN--Filed defts. notice of appearance by: Thomas Grimes of 1036 Park Ave, NYC 10025		
07-22-75	VINCENT DI DONATO--Filed defts. notice of appearance by: Irving Cohen of 170 Bdwy, NYC 10038		
09-19-75	Case called. Trial date set for Tuesday, Oct. 14, 1975 at 10am in Rm. 1 Weinfeld, J.		
10-9-75	DI DONATO--(deft. and atty. Irving Cohen, present)--deft. withdraws plea of not guilty and pleads GUILTY to ct. 1. PSI ordered. Sentence adj. to Friday, Nov. 7, 1975 at 10am in Rm. 506. Cts. 2 remains open. Bail contd. as previously fixed at \$5,000 PRB. Weinfeld, J.		
10-9-75	MC LEAN--deft. and atty. John Curley present. Deft. withdraws plea of not guilty and pleads GUILTY to ct. 1. PSI ordered. Sentence adj. to Friday, Nov. 7, 1975 at 10am in Rm. 506. Cts. 2 & 3 remain open. Bail contd. as previously fixed at \$2,000 PRB s/w \$200.00c Weinfeld, J.		
10-9-75	BORCHARDT--deft. and atty. Milton Rosenberg present--deft. withdraws prev plea of not guilty and enters plea of GUILTY to ct. 1. PSI ordered. Sentence adj. to Friday, Nov. 7, 1975 at 10am in Rm. 506. Cts. 2, 3 & 6 remain open. Bail contd. as previously fixed at \$20,000 PRB. Weinfeld, J.		
10-10-75	R. PETRILLO--deft. and atty. Joel Winograd, present--Deft. withdraws plea of not guilty and pleads GUILTY to ct. 1. PSI ordered. Sentence to Friday, Nov. 7, 1975 at 10am in Rm. 506. Cts. 2, 3, 4 remain ope Bail contd. as previously fixed at \$5,000 PRB. Weinfeld, J.		
10-14-75	WILLIAM WOOTEN--trial adj. to Thursday, Oct. 16, 1975 at 10am in Rm. 128. Weinfeld, J.		
10-16-75	WM. WOOTEN-- Jury trial begun. Before Weinfeld, J.		
10-17-75	" --jury trial contd.		
10-20-75	"--jury trial contd. and concluded. Deft. found GUILTY on cts. 1 & as charged. PSI ordered. Sentence adj. to Friday, Nov. 21, 1975 at 10am in Rm. 518. Bail contd. as previously fixed in the amt. o \$5,000 PRB. Weinfeld, J.		

(see Pg. 3)

75 CR 670 EW USA v. Petrillo, et.al.

DATE	PROCEEDINGS	Date Of Judgment
11-21-75	VINCENT DI DONATO--Filed JUDGMENT(atty. Irving Cohen,present)-- deft. is sentenced as a Youth Offender under Title 18,USC,Section 5010(a). Impositin of sentence is suspended on ct. 1. Deft. placed on probation for a period of TWO(2) YEARS subject to the standing probatio order of this court. Ct. 2 is dismissed on motion of defts. counsel with the d consent of the govt. Weinfeld,J. (copies issued)	
11-21-75	ROMEO PETRILLO--Filed JUDGMENT(atty. Joel Winograd,present)-- the deft. is hereby committed to the custody of the atty. General or his authorized representative for imprisonment for a period of EIGHTEEN(18) MONTHS on ct. 1. Pursuant to the provisions of Title 21,Section 841,USC, deft. is placed on Special Parole for a term of THREE(3) YEARS to commence upon the expiration of confinement. Pursuant to the provisions of Section 4208(a)(2),USC, the deft. shall become eleigible for apx parole at such time as theBoard of Parole may determine. Cts. 2,3,4 are dismissed on motion of defts. counsel with the consent of the govt. Deft. to surrender to the US Marsahl on Monday,Dec. 1,1975 at 10:30am in Rm.506. Weinfeld,J. (copies issued)	
1-21-75	WILLIAM WOOTEN--Filed JUDGMENT(atty. David Michaels,present)-- the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of TWO(2) YEARS pursuant to Section 3651,of Title 18,USC as amended with provision deft. be confined in a jail type institution for a period of SIX(6) MONTHS as provided in the aforesaid section. ON each of cts. 1 & 3 to run concurrently with each other. Execution of the remainder of thesentence is suspended. Pursuant to 8 the provisions of Title 21,Se 841USC, the deft. is placed on Special Parole for a term of THREE(3) YEARS to commence upon the expiration of confinement. Deft. bandx contd. on bail pending appeal on conditon that the appeal be filed expeditiously and all rules of themart of appeals are complied with. Weinfeld,J. (copo es issued)	
11-26-75	David McLean- Filed defts affdvt. and notice of motion for reduction of sentence and for a stay of surrender. - Ref. 12-09-75	
11-28-75	Filed Governments request to charge.	
11-28-75	Filed Governments supplemental request to charge.	
11-28-75	WOOTEN- Filed defts notice of appeal to the USCA for the 2nd Circuit from judgment of conviction. - copies to deft. Wooten, 172 W. 79th St., NYC 10024 and US Attorneys Office.	
2-12-75	VINCENT DI DONATO--Filed CJA copy # 2 appointing Irving Cohen of 170 Bdwy,NYC 10038 as defts. atty. Orig. mailed to AO,Wash,DC for payment.	
20-12-75	MC LEAN--Filed memo end. on defts. motion dated Nov. 26,1975 to modify sentence---Upon further consideration,the Court adheres to its original determination. Upon representation by defts. counsel, thexenurx as to the examination date for the current semester, the Court extends the date of surrender to Jan. 12,1976 at 10:30am. Weinfeld,J. m/n (copy to marshals office)	

A-4

5 CR 670 USA VS PETRILLO ET AL WEINFELD, J.

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110 Rev. 5-50-60 Docket Continuation

DATE	PROCEEDINGS	Date Order or Judgment Noted
23-75	MARGARET PETRILLO--Filed CJA copy # 2 appointing Robert Mitchell of 51 Chambers St, NYC 10007 as defts. atty. Orig. mailed to AO, Wash., DC for payment.	
3-75	MARGARET PETRILLO--Filed CJA copy # 5 appointing Robert Mitchell as defts. atty. Orig. mailed to AO, Wash., DC for payment. Weinfeld, J.	
4-75	WOOTEN--Filed letter dated Oct. 22, 1975 from JUROR Patrick Treston stating he was intimidated while deliberating on certain cts. of the indictment.	
24-75	WOOTEN--Filed letter dated Oct. 22, 1975 from Judge Weinfeld's chambers to JUROR Patrick Treston and Paul J. Curran, US Atty. of SDNY re: court does not seek to impeach jury verdict made in this action. Weinfeld, J. m/n	
	Filed transcript of record of proceedings dated Oct 9, 1975	
	Filed transcript of record of proceedings dated Oct 14, 1975 (over)	
4-75	MARGARET PETRILLO--Filed and entered nolle prosequi. Weinfeld, J.	
KELLEY --11-24-75--	Filed and entered nolle prosequi. Weinfeld, J.	
1-75	RANDALL BORCHARDT--Filed JUDGMENT(atty. Milton Rosenberg, present)-- the deft. is hereby committed to the custody of the Atty. General or his authorized representative for imprisonment for a period of TWO(2) YEARS pursuant to Section 3651 of Title 18, USC as amended with provision deft. be confined to a jail type institution for a period of six(6) months as provided in theaforesaid section. Execution of remainder of sentence is suspended. Deft. placed on probation for period of TWO(2) YEARS to commence upon expiration of confinement subject to the standing probation order of this court, pursuant to Section 5010(d), Title 18, USC. Cts. 2, 3, 6 are dismissed on motion of defts. counsel with the consent of the govt. Deft. to surrender to the U.S. Marshal on Monday, Dec. 1, 1975 at 10:30am in Rm. 506. Weinfeld, J. (copies issued)	
1-75	DAVID MC LEAN--Filed JUDGMENT(atty. John Curley, present)-- the deft. is hereby committed to the custody of the Atty. General or his authorized representative as a Youth Offender for treatment and supervision pursuant to Section 5010(b) of Title 18, USC chapter 402 until discharged by the Federal Youth Correction Div. of the Board of Parole as provided in section 5017(c) of Title 18, USC on ct. 1. Cts. 2, 3 are dismissed on motion of defts. counsel with the consent of the govt. Deft. to surrender to the US Marsahl on Monday, Dec. 1, 1975 at 10:30am in Rm. 506. Weinfeld, J. (copies issued)	

(over)

*re-typed in 11/22/75
w. omission of overt acts
irrelevant provided to Duns
10/19/75 - Monday*

A-5

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

- v -

ROMEO PETRILLO, a/k/a "Roy",
MARGARET PETRILLO,
VINCENT DIDONATO,
DAVID McLEAN,
RANDALL BORCHARDT,
WILLIAM WOOTEN, and
JOHN KELLEY,

Defendants.

INDICTMENT

75 Cr. 670

COUNT ONE

The Grand Jury charges:

1. From on or about the 1st day of February, 1975, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, ROMEO PETRILLO, a/k/a "Roy", MARGARET PETRILLO, VINCENT DIDONATO, DAVID McLEAN, RANDALL BORCHARDT, WILLIAM WOOTEN, and JOHN KELLEY, the defendants, and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances, the exact amount thereof being to the Grand Jury unknown, in violation of Sections 812, 841(a)(1), 841(b)(1)(A) and 841(b)(1)(B) of Title 21, United States Code.

COUNT THREE

The Grand Jury further charges:

On or about the 10th day of March, 1975, in the Southern District of New York, RANDALL BORCHARDT, WILLIAM WOOTEN, DAVID McLEAN, and ROMEO PETRILLO, a/k/a "Roy", the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 195.32 grams (net weight) of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

(1) On or about February 27, 1975, defendants ROMEO PETRILLO, a/k/a "Roy", VINCENT DiDONATO, and DAVID McLEAN met at 121-6 Freedom Avenue, Staten Island, New York and delivered approximately one-eighth of a kilogram of cocaine.

(2) On or about March 7, 1975, defendants RANDALL BORCHARDT, DAVID McLEAN, and ROMEO PETRILLO possessed approximately three ounces of cocaine.

(3) On or about March 10, 1975, defendants WILLIAM WOOTEN and RANDALL BORCHARDT took a taxicab to 1687 Third Avenue, New York, New York.

(4) On or about March 10, 1975, defendants RANDALL BORCHARDT, ROMEO PETRILLO, a/k/a "Roy", and DAVID McLEAN met in Apartment 2-S 1687 Third Avenue, New York, New York.

(5) On or about March 10, 1975, defendants WILLIAM WOOTEN and RANDALL BORCHARDT met in the vicinity of Jimmy Murray's Bar, 94th Street and Third Avenue, New York, New York.

(6) On or about March 10, 1975, defendant RANDALL BORCHARDT delivered approximately seven ounces of cocaine.

(7) On or about March 10, 1975, defendants ROMEO PETRILLO, a/k/a "Roy", and DAVID McLEAN received \$200.00.

SMS:bmj
d-236

(8) On or about May 5, 1975, defendant RANDALL BORCHARDT possessed approximately twenty pounds of marijuana.

(9) On or about May 5, 1975, defendant JOHN KELLEY possessed approximately one pound of marijuana, approximately 50,000 pills, and \$2,090 cash.

(Title 21, United States Code, Section 846).

1 GW

[2] A-7

2 THE CLERK: United States against Wooten.
3 Government ready?

4 MR. SCHATZ: Government ready.

5 THE COURT: Mr. Grimes, I have a panel of jurors
6 here. We should have started at 10:00 o'clock.

7 MR. GRIMES: I made a second call to Mr. Wooten's
8 apartment and the young lady who answered the phone tells
9 me that he is on his way.

10 I would not expect him to fail to appear because
11 his appearance is guaranteed by William Hammer, his
12 father's business partner, in effect by his father, too.

13 THE COURT: How long can I keep this panel
14 waiting?

15 MR. GRIMES: I understand that. I made those
16 two phone calls and I have been looking for him.

17 THE COURT: I will give him another ten minutes
18 to get here. Otherwise I will issue a warrant for him.

19 Members of the jury, there will be a short delay.
20 Then we will proceed.

21 (Pause.)

22 (In robing room.)

23 MR. GRIMES: Mr. Wooten wants to make the
24 application personally, Judge, but I will tell you what it
25 is.

1 GW

[3] A-10

2 He wants to substitute a lawyer named David
3 Michaels in my place. He has spoken to Mr. Michaels and
4 he has been telling me -- Mr. Wooten has been telling me
5 that he and I have --

6 THE COURT: Bring him in here.

7 MR. GRIMES: Shall I bring him in here?

8 THE COURT: Certainly.

9 (Defendant enters robing room.)

10 MR. GRIMES: If your Honor please, this is William
11 Wooten, the defendant in this action.

12 Mr. Wooten, you have an application to make to
13 his Honor, I understand.

14 THE DEFENDANT: Yes, your Honor.

15 My counsel and I have reached an irreconcilable
16 point. It seems very crucial to me. I would like to
17 make application to obtain other counsel.

18 THE COURT: When did you reach this irreconcilable
19 point? This case was set for trial on September 19. This
20 is October 14.

21 THE DEFENDANT: I was never informed it was set
22 for trial. I was told I had a good chance for the case to
23 be dismissed. I came to court last Thursday. I was told
24 by my counsel my best course -- it was impossible to have
25 the case dismissed and we would be going to trial soon.

1 GW

2 That was the first I knew about it.

3 THE COURT: Is that correct, that you never told
4 him the date for trial?

5 MR. GRIMES: That is not so, your Honor.

6 THE COURT: When did you inform him as to the date
7 for trial?

8 MR. GRIMES: A week ago, that it was definite.
9 Ten days ago, I should think.

10 THE COURT: Who is the counsel that you seek to
11 have take the place of your present counsel?

12 THE DEFENDANT: Mr. David Michaels.

13 THE COURT: Where is he?

14 THE DEFENDANT: He is here in New York. First
15 of all, he wanted -- I had to dismiss him also because he
16 wanted \$3500, which I am not able to pay. He demanded it
17 by Monday. I don't have it. So I was also trying to
18 obtain money for another counsel to find out the position.

19 THE COURT: It seems to me that this an attempt
20 to delay this trial. It is not going to be delayed.

21 THE DEFENDANT: Wait. September 19, your Honor,
22 is not a week ago. I am not purposely trying to delay --

23 THE COURT: September 19 was the date this case
24 was set for trial. Mr. Grimes has just stated to the Court
25 that you were notified I believe at least ten days ago

1 GW

[5] A-12

2 of the date for trial.

3 Is that correct, Mr. Grimes?

4 MR. GRIMES: Yes, sir.

5 THE COURT: This seems to me to be a ploy just
6 to put this case over. I am not going to permit it.

7 If you have another attorney you want to bring
8 in to sit with Mr. Grimes -- I am not going to relieve Mr.
9 Grimes now.

10 THE DEFENDANT: Can you ask Mr. Grimes if he
11 sincerely thinks I am using a ploy to delay the trial?

12 THE COURT: I don't need his judgment about it.
13 I know when the case was set for trial. I set the case
14 for trial and it was on September 19.

15 THE DEFENDANT: I didn't know I was going to
16 trial, your Honor.

17 THE COURT: You knew it ten days ago.

18 THE DEFENDANT: No, I didn't. I didn't under-
19 stand that.

20 THE COURT: In the first place, you were supposed
21 to be here 10:00 o'clock this morning and you were not
22 here. I was about to issue a bench warrant for your
23 arrest.

24 THE DEFENDANT: Isn't it possible I sincerely
25 want a different lawyer, I did not understand the ramifica-

1 GW

2 tions of the trial?

3 THE COURT: How long will it take you to get
4 another lawyer?

5 THE DEFENDANT: A week or two.

6 THE COURT: I am not putting this case over for
7 a week or two by any manner or means. My calendar is set
8 up with trials back to back. This means a complete dis-
9 orientation.

10 THE DEFENDANT: I was not informed of the amount
11 of money.

12 Will you tell him the first time I was given a
13 fee for the trial?

14 MR. GRIMES: I will say that when I originally
15 investigated this case I made a recommendation to Mr.
16 Wooten and to his father and I understood we had an agree-
17 ment so my retainer did not include a trial fee, but when
18 it became evident that Mr. Wooten had chosen a different
19 course than I recommended, then I did set a trial fee and
20 I informed His father of that fact because his father had
21 paid me directly in another matter in which I represented
22 his son here. So that is the business about his fee.

23 THE DEFENDANT: Can you tell him when you
24 informed my father of that? It was only four or five days
25 ago and you couldn't reach my father.

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[7] A-14

2 MR. GRIMES: I had to leave a message for
3 him, that's right. However, I am in the case and until
4 his Honor relieves me I must continue.

5 THE COURT: I am not going to relieve you.

6 THE DEFENDANT: How can I pay the fee --

7 THE COURT: Will your father pay the lawyer's
8 fee for the other lawyer?

9 THE DEFENDANT: I am trying to find that out.

10 THE COURT: Your father isn't difficult to get.

11 THE DEFENDANT: It's not that. It is \$3500.

12 THE COURT: I am not interested in what you
13 pay a lawyer.

14 THE DEFENDANT: I am saying I can apply for
15 Legal Aid on my own grounds.

16 THE COURT: I will not allow Mr. Grimes to
17 get out of the case at this point.

18 THE DEFENDANT: Your Honor, can you understand
19 that I did not understand I had to go to trial until
20 Thursday?

21 THE COURT: I don't understand it at all. It
22 is quite obvious to me what's going on here. You are
23 just trying to put this case over and delay it, and I am
24 not going to permit any delay.

25 THE DEFENDANT: Why would I want to delay it?

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2 MR. GRIMES: Excuse me, if your Honor please.
3 I understand why your Honor draws that inference, but
4 really I believe Mr. Wooten is sincere. If I may say so,
5 Judge, I strongly recommend -- and Mr. Schatz knows
6 this, I discussed it with Mr. Schatz -- I strongly
7 recommended a plea here.

8 THE COURT: I am not interested in that, Mr.
9 Grimes. He has an absolute right to go to trial and he
10 will get a trial if that's what he wants, but he is not
11 going to delay the trial. That is the only point I am
12 making.

13 MR. GRIMES: I really want to say he does
14 want another lawyer. He talked to Mr. Michaels, who
15 thinks he has a good chance of winning on a trial. I
16 have a difference of opinion, a very firm difference of
17 opinion, with Mr. Wooten in that respect.

18 THE COURT: Let me have my calendar, please.

19 I will give you an opportunity to get your own
20 lawyer, if you think you can get one, but from what I
21 understand, I doubt you can pay a lawyer. Can you?

22 THE DEFENDANT: Not personally, but I might
23 be able to borrow the money.

24 THE COURT: It is evident that you are just
25 running after a will of the wisp here. Let's get down

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[9] A-16

2 to fundamentals.

3 You file an affidavit you are without funds to
4 engage a lawyer on your own account, and I will appoint
5 a lawyer. I will appoint him forthwith this morning. I
6 will direct him to confer with you today. I will require
7 Mr. Grimes to remain in the case to give him all informa-
8 tion and the case will proceed to trial if the lawyer
9 represents to me he will be ready either tomorrow or
10 Thursday morning.

11 THE DEFENDANT: Your Honor, if I talk to my
12 father, all I need is a couple of days.

13 THE COURT: You are not getting a couple of
14 days. This was set a month ago.

15 THE DEFENDANT: But as he said, I was only
16 told ten days ago.

17 THE COURT: That is ample time.

18 THE DEFENDANT: Can you ask him --

19 THE COURT: I am not conducting a further
20 inquiry. If you are without funds to engage a lawyer, I
21 will assign a lawyer free of charge to you. Do you
22 understand that?

23 THE DEFENDANT: I want to try to obtain David
24 Michaels.

25 THE COURT: You get David Michaels and I
will put the case down for Thursday morning.

1 GW

2 THE DEFENDANT: Could I talk to him on the phone?

3 THE COURT: You are free to use the phone.

4 The case will go forward Thursday morning whether Mr.
5 Michaels is your lawyer or not. I am quite well satis-
6 fied that this whole setup is simply to delay the trial
7 and it is not going to delay the trial. I will give you
8 from this morning until Thursday morning. That is 48
9 hours. You have been in touch with Mr. Michaels. If you
10 can get the fee to pay him, pay him. If not, you will
11 notify me within the hour and I will assign a lawyer to
12 represent you.

13 MR. GRIMES: Thank you, your Honor.

14 THE COURT: You notify me within the hour
15 whether or not you have Mr. Michaels.

16 THE DEFENDANT: That doesn't seem like ample
17 time if he is not in his office.

18 THE COURT: I hold it is ample time.

19 THE DEFENDANT: It is possible I do not under-
20 stand all the ramifications of the law, your Honor.

21 THE COURT: That is why you are getting a lawyer.
22 You have had, as far as my records are concerned, from
23 September 29. From your lawyer's own statement, you
24 have had ten days, which was more than ample time.

25 Were you ready to go to trial?

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[11] A-18

MR. GRIMES: Yes, sir.

THE DEFENDANT: How could he be ready if he hadn't discussed the fee with my family?

THE COURT: The fee has nothing to do with going to trial.

THE DEFENDANT: I was under the assumption I was not going to trial. My father wasn't informed I was going to trial.

THE COURT: Your father is not on trial; you are.

THE DEFENDANT: Ten days is not an inordinate amount of time.

THE COURT: I tell you you are going to trial in 48 hours from now. My calendar has been all arranged. If you get Mr. Michaels, fine. If you don't, if you notify me in one hour I will get a lawyer, and you remain here and he will consult with you and he will give you all the time you require and he will be ready to go to trial Thursday morning, and you are to remain in the case until you are released and you are to confer with whatever lawyer it is, whether it is Mr. Michaels or a lawyer I have chosen.

(In open court.)

THE COURT: Members of the jury, circumstances

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2 have developed so that I direct you to return to the
3 original room from which you came and you may be assigned
4 to another case. So you will all please go back to
5 Room 109.

6 Mr. Grimes, you wait here with him. I want
7 to be notified in one hour whether he got Mr. Michaels.
8 If he does not get Mr. Michaels, I will assign a lawyer.

9 THE DEFENDANT: Can Mr. Michaels join in
10 later if I hire him?

11 THE COURT: He can come in any time he wants.

12 - - -

(Case called.)

MR. SCHATZ: The government is ready.

THE CLERK: Is the defendant ready?

MR. MICHAELS: Ready. The defendant is ready to proceed, but I believe there are certain facts which both Mr. Schatz and I should disclose to the Court prior to proceeding, certain problems that have arisen and certain statements we wish to make for the record and for the information of the Court.

MR. SCHATZ: Last night I learned for the first time that at one time there existed a U.S. Attorney interview sheet for one Randall Borchardt who will be a government witness in this case. This witness sheet was completed by Richard Weinberg, an Assistant United States Attorney in our office. Mr. Engel, who was in charge of this matter until approximately ten days ago, apprised me of the fact that he misplaced or somehow this document was no longer in his files, that he had searched through his entire file cabinet to find the whereabouts of this document and he was unsuccessful. Mr. Weinberg also stated that he, too, had looked through his entire folder and attempted to locate this document. Mr. Engel further stated that it was his recollection that this document merely related to questions of pedigree and that --

1 gwrn

[3] A-21

2 MR. MICHAELS: Objection. It directly contradicts
3 what was said to me last night by Mr. Schatz.

4 THE COURT: Mr. Michaels, why don't you let him
5 finish his statement?

6 MR. MICHAELS: Excuse me, your Honor. I apologize.

7 MR. SCHATZ: It is our understanding both from
8 discussing the matter with Mr. Weinberg, Mr. Engel and Mr.
9 Rosenberg --

10 THE COURT: Who is Mr. Rosenberg?

11 MR. SCHATZ: Mr. Rosenberg is Borchardt's attorney
12 who was present at that interview. That to the best of
13 their recollection Mr. Borchardt at that time did not make
14 any statements with respect to this case. I should say
15 further that no one is absolutely certain as to that fact.
16 They are basing that on their best recollection and in Mr.
17 Weinberg's case, he has very little recollection at all as
18 to the interview.

19 I think it also should be noted that the government
20 has turned over the 3500 material in this case a number of
21 days prior to trial, including material which contains
22 statements of Borchardt at the time of his arrest and it
23 would be our view that, first of all, the evidence will show
24 that in all likelihood no statements relating to the facts
25 of this case were made at that time but, in any event, the

1 gwrn

2 defendant has received statements of the defendant made at
3 about the same time made to Agent James Greenan of the Drug
4 Enforcement Administration.

5 And finally, the government submits that this is
6 an instance in which this document, whatever its value, was
7 lost through no bad faith at all, it is an absolute instance
8 in which the document was lost or misplaced or disappeared
9 through no negligence on the government but merely was a
10 good faith loss.

11 MR. MICHAELS: Your Honor, when I received a
12 telephone call last night from Mr. Schatz, who did disclose
13 to me the document in question was missing, he informed me
14 that neither Mr. Weinberg nor Mr. Engel had any present
15 recollection of whether in fact statements were taken or
16 whether in fact those statements related to this case or
17 what their contents may have been. He said they are both
18 furiously trying to remember whether statements were given
19 and, if so, what they might possibly have said. Borchardt
20 is a crucially important witness and the crucially important
21 point from my point of view is there seems to be some
22 indication that he has never told the same story twice or
23 may, in fact, have at sometimes had some discrepancy in
24 what he was saying. We do think it is crucially important
25 as to what he told the United States Attorney's Office.

1 gwrn

[5]A-23

2 Furthermore, it is our belief, although Mr.
3 Schatz refuses to affirm or deny this, that in fact that
4 missing document constitutes the United States Attorney's
5 entire record reduced to writing of statements given by
6 Borchardt to their office. In view of what we feel is the
7 crucial importance of this document, we would urge that in
8 fact it would be not in the interests of justice if the
9 jury were permitted to hear Mr. Borchardt and not become
10 aware of whatever statements were given at that time and the
11 loss of that document or unavailability and the reasons
12 therefor.

13 THE COURT: You are assuming there is information
14 in the document which would contradict his trial testimony.
15 Is that your assumption?

16 MR. MICHAELS: I am assuming that may well be the
17 case.

18 THE COURT: You don't know what statements he made.
19 As I understand, Mr. Schatz and Mr. Weinberg state they have
20 no recollection of what was contained in the document and
21 I think Mr. Schatz went beyond it and states -- did you
22 have any contact at all with him or was it your predecessor?

23 MR. SCHATZ: It was Mr. Engel, my predecessor.

24 THE COURT: I correct that statement. It was
25 Engel.

1 gwrn
2 He states that there is nothing more taken than
3 his pedigree.

4 MR. MICHAELS: Your Honor --

5 THE COURT: I will require -- I will dispose of it
6 very promptly. I will require the government to make
7 available to you Mr. Schatz and Mr. Weinberg and who else
8 allegedly --

9 MR. SCHATZ: I am Mr. Schatz. I think you meant
10 Mr. Engel.

11 THE COURT: I still mean Mr. Engel, that's right.
12 Tell me, who had the interview? Was it Mr. Engel and Mr.
13 Weinberg?

14 MR. SCHATZ: Mr. Weinberg had the interview.

15 THE COURT: Anybody else?

16 MR. SCHATZ: From the United States Attorney's
17 Office, no, your Honor.

18 MR. MICHAELS: Your Honor --

19 THE COURT: Let me finish. I will require both
20 Mr. Engel and Mr. Weinberg --

21 MR. SCHATZ: I misspoke. James Greenan, an agent
22 of the Drug Enforcement Administration, was present at that
23 time and I believe his recollection is consistent with what
24 I have represented to the Court.

25 MR. MICHAELS: Your Honor, if I may, I think there

1 gwrn

[7] A-25

2 is somewhat of a discrepancy. I reiterate I asked Mr.
3 Schatz to state on the record whether last night he told me
4 this document contained not only pedigree but it may have
5 contained statements --

6 THE COURT: Mr. Michaels, it doesn't make any
7 difference what he told you. It does make a difference what
8 knowledge Mr. Engel, Mr. Weinberg and this other gentleman
9 have, and will require they be made available to you for
10 questioning in advance of their trial testimony if anybody
11 is going to put him on the witness stand, whether the
12 government intends to put him on the witness stand or you do.
13 You may have a preliminary interview with him without the
14 hearing and presence of government counsel and you may act
15 accordingly. If you want to call him, you may call him.
16 You are proceeding on the assumption that there is some
17 information that this Mr. Borchardt gave or some statement
18 he made which is bound to be at variance with his trial
19 testimony. You can't possibly know that but you are
20 entitled to know what he did say according to their best
21 recollection since the government has represented that on
22 the basis of the best evidence they have been unable to
23 locate the report. I will make him available to you.

24 MR. SCHATZ: Your Honor, I think it should be
25 noted Mr. Weinberg and Mr. Engel are in the courtroom.

1 gwrn

[8] A-26

2 THE COURT: Let's get started on this thing. I did
3 make a statement that they would be made available to
4 defense counsel for an interview by him. You don't have to
5 add the statement that they are here. I am directing they
6 be made available.

7 MR. SCHATZ: Very well.

8 THE COURT: Call the jury.

9 MR. MICHAELS: Your Honor, there are some other
10 matters prior to that which I feel compelled --

11 THE COURT: What else is there?

12 MR. MICHAELS: First, your Honor, with regard to
13 the conversation in court two days ago when I first appeared
14 on this matter, I know the Court seemed to be of the opinion
15 that the defendant was perhaps not being completely candid
16 in requesting further time. First with regard to that, I
17 feel obligated to disclose to the Court that I have spoken
18 to three persons who heard from the office of the prior
19 counsel within three or four days of last Tuesday, two
20 days ago. I have learned that Mr. Grimes was ill and
21 apparently a family member was acting on his behalf in
22 handling this. There were conversations between that family
23 member and my client, his father, his father's business
24 associate, who had recommended that attorney. Apparently it
25 was not disclosed to any of those individuals at the time

1 gwrn

[9] A-27

2 that this matter was scheduled for trial on Tuesday. There
3 were certain other problems in the conversations that I do
4 not feel are immediately germane but which I am willing to
5 disclose to the Court.

6 THE COURT: Let me say this to you, Mr. Michaels.
7 Whether I had an attitude the defendant was being candid and
8 forthright is quite beside the point. The defendant has a
9 right to a speedy, fair trial. It has nothing to do with
10 the trial proper. Put it out of your mind. I will accept
11 your statement. I was concerned about the case going forward
12 in the light of other commitments, pressing commitments, the
13 Court had and the long period of time that had passed from
14 when the case was on my calendar and I set it for trial.
15 It was a matter of five weeks. I must say I was shocked
16 when the application for adjournment was made but that is
17 water over the dam, it has nothing to do with the case,
18 your client is entitled to a fair trial and let's go
19 forward.

20 MR. MICHAELS: I am ready to go forward. I want
21 to put on the record my objection to being compelled to go
22 forward forty-eight hours between coming into the case and
23 going forward. That has not given me sufficient time to
24 read through the 3500 material, to look into the somewhat --

25 THE COURT: Mr. Michaels, let's not continue this.

1 gwrn

[235] A-28

2 I will decide that at that time.

3 MR. MICHAELS: Your Honor, I think we may have one
4 other matter, that is, Mr. Schatz informed me today he would
5 object strenuously to our calling either Assistant United
6 States Attorney Engel or Assistant United States Attorney
7 Weinberg to testify about the only time Mr. Borchardt's
8 statement was written down but when some oral statements made
9 by him were reduced to writing and the fact that that document
10 was lost.

11 THE COURT: I will not permit the jury to hear the
12 evidence as to whether or not it was lost. You presented
13 that matter yesterday. I made available to you all the
14 witnesses in the case who had any knowledge of it. This is
15 not to be tried before the jury.

16 We will go inside. I will announce to the jury
17 that the defense is to go forward and then you may go
18 forward.

19 MR. MICHAELS: May I have three minutes to confer
20 with my client, your Honor.

21 THE COURT: After I make the announcement to the
22 jury that the government has rested and the defense may go
23 forward.

24 (In open court.)

25 THE COURT: Members of the jury, as you heard, the

1 gwrn

2 government has rested. The defense may go forward.

3 MR. MICHAELS: Prior to proceeding I find it
4 necessary to ask for two to three minutes for a brief
5 conference.

6 THE COURT: I will give you more than two or three
7 minutes. I will give you ten minutes.

8 We will take our mid-afternoon recess at this
9 time rather than later on.

10 (Recess)

11 THE COURT: Where is the defendant?

12 MR. MICHAELS: One moment, your Honor.

13 (Defendant enters courtroom.)

14 MR. MICHAELS: The defendant will call one person
15 in this proceeding, Susan Wilhemmer.

16 THE COURT: I will hear you on that because of
17 what you told my law clerk. You may come inside.

18 (In the robing room.)

19 THE COURT: You advised my clerk of the nature of
20 the testimony by this witness. Say it for the record now.
21 What is the offer of proof?

22 MR. MICHAELS: Miss Wilhemmer will testify some
23 six or seven months prior to the incidents which occurred
24 here and which are the subject of these proceedings that she
25 observed an incident along with Mr. Wooten wherein Mr. Wooten

1 gwrn

[287]A-30

2 reported Agent O'Connor to the Assistant United States
3 Attorney and to the Drug Enforcement Administration after two
4 of them along with others observed what appeared to be a
5 false arrest and the deliberate planting of evidence. They
6 signed statements, they gave statements to several officials,
7 both in this building and DEA headquarters, and their names
8 were, I assume, recorded in the files. She was not a witness
9 to any sale of cocaine or any other incident which occurred
10 herein, in that, however, this may establish a motive for
11 selective memory or observation on the part of some
12 government witnesses. We would urge that it is germane.

13 THE COURT: Read that statement to me again.

14 (Record read.)

15 THE COURT: Six or seven months prior to when?

16 MR. MICHAELS: I was informed it was early July,
17 1974. So it is somewhat more than seven months before the
18 time when Mr. O'Connor supposedly observed Mr. Wooten
19 leaving Mr. Borchardt's apartment.

20 THE COURT: This witness is going to testify as
21 to what?

22 MR. MICHAELS: As to her observation.

23 THE COURT: Of whom?

24 MR. MICHAELS: Agent O'Connor.

25 THE COURT: Did what?

1 gwrn

[288] 4-31

2 MR. MICHAELS: They observed an arrest on the
3 street on Eighth Avenue at approximately 23rd Street in
4 Manhattan where Agent O'Connor appeared to them to be planting
5 evidence falsely. They reported it to the DEA and to the
6 Assistant United States Attorney's Office in this building.
7 They gave statements, they signed statements. Subsequently
8 the arrests were dropped, no arraignment ever occurred.

9 THE COURT: I sustain the government's objection
10 to the offer of proof.

11 (In open court.)

12 THE COURT: If you have another witness, call
13 another witness.

14 MR. MICHAELS: The defense will present no other
15 witnesses and will rest at this time.

16 THE COURT: Will counsel give me an idea how much
17 time you want to sum up? Suppose you come up here.

18 MR. SCHATZ: I haven't actually timed it, your
19 Honor, but I imagine I would ask for about twenty-five minutes
20 for my initial summation and ten minutes for my rebuttal.

21 MR. MICHAELS: I would estimate an hour, your
22 Honor.

23 THE COURT: You may have the hour.

24 MR. SCHATZ: May I take more than twenty-five
25 minutes, then?

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v. [323] A-32

UNITED STATES OF AMERICA

-against-

75 Crim. 670

WILLIAM WOOTEN

New York, New York
October 20, 1975
10:00 A. M.

B e f o r e:

HON. EDWARD WEINFELD, D. J., and a Jury.

- - -

(Jury present.)

THE CLERK: Ladies and gentlemen, the Court is about to instruct the jury. All persons wishing to leave may do so now. Those who wish to stay must remain seated until the completion of the Court's charge.

Marshal, secure the door.

THE COURT: Members of the jury: We are now at the stage of trial where you will soon undertake your final function as jurors, and here you perform one of the most sacred obligations of citizenship, that is, acting as ministers of justice.

You are to discharge this final duty in an attitude of complete fairness and impartiality and, as was emphasized by me at the time of your selection as jurors, without bias or prejudice with respect to either the government or the defendant as parties to this controversy.

1 GW2

2 The fact that the trial was of comparatively
3 short duration by no means betokens its importance. It is
4 important to the defendant, who is charged with the
5 commission of serious crimes; equally it is important to
6 the government, for the enforcement of the criminal laws
7 is a matter of prime concern to the community and its
8 welfare.

9 Let me add: the fact that the prosecution is
10 brought in the name of the government, the United States
11 of America, entitles it to no greater consideration than
12 that accorded to any other party to the litigation. But
13 by the same token, it is entitled to no less consideration.
14 All parties - government, corporations and individuals
15 alike - stand as equals at the bar of justice.

16 Your final role is to decide and pass upon the
17 fact issues. You, the members of the jury, are the sole
18 and exclusive judges of the facts. You pass upon the weight
19 of the evidence; you determine the credibility of witnesses;
20 you resolve such differences as there may be in testimony
21 and you draw whatever reasonable inferences may be warranted
22 from the facts as you determine them.

23 My function at this point is to instruct you
24 as to the law, and it is your duty to follow these instruc-
25 tions of law and to apply them to the facts as you may

1 GW3

2 find them.

3 With respect to any fact matter, it is your
4 recollections and yours alone that governs. Anything that
5 counsel for the government or the defense may have said
6 during the progress of the trial with respect to a fact
7 matter, or included in a question or advanced during the course
8 of summation is not to be taken in place of your own
9 independent recollection of the evidence. So, too, if
10 during the course of these instructions I shall refer to
11 any fact matter that does not accord with your own independent
12 recollection, again that governs at all times.

13 Before we consider the precise charges against
14 William Wooten, the defendant on trial before you, some
15 preliminary matters should be noted.

16 Count 1, the conspiracy count in the indictment,
17 charges that the defendant, William Wooten, conspired with
18 one or more of six persons named therein to violate the
19 federal drug control laws.

20 Count 3, the substantive count, charges that
21 Wooten and three other persons committed the crime referred
22 to therein, the alleged sale of seven ounces of cocaine.

23 You are concerned only with the guilt or
24 innocence of William Wooten. The fact that other persons
25 named in those counts of the indictment are not on trial

1 GW4

2 with Wooten is not to enter into your deliberations, nor
3 may you draw any inference for or against him or the govern-
4 ment by reason of that fact. Whether persons named in
5 the same indictment are to be tried together or separately
6 is a matter of trial procedure which does not concern you.

7 You are aware from his testimony that Randall
8 Borschardt has pled guilty to the conspiracy count. That
9 was his personal plea. That fact may not be considered
10 against Wooten, the defendant here on trial, nor may any
11 adverse inference be drawn against him by reason thereof.

12 Guilt is personal. The guilt or innocence
13 of the defendant must be determined solely upon the evidence
14 presented against him, or the lack of evidence. The
15 charges against him stand or fall upon the proof, or the
16 lack of proof, as to him and not as to any co-defendant
17 or anyone else.

18 There are certain principles of law which apply
19 in every criminal case, and to which I made reference at
20 the time of your selection as jurors. I repeat these.

21 The indictment upon which the defendant is
22 brought to trial is simply an accusation, a charge. It
23 is no evidence or proof of the defendant's guilt. No
24 weight is to be given to the fact that a grand jury returned
25 an indictment against the defendant.

1 GW5

2 He has pleaded not guilty. Thus, the government
3 has the burden of proving the charges against him beyond
4 a reasonable doubt.

5 The defendant does not have to prove his
6 innocence. On the contrary, he is presumed to be innocent
7 of the accusations contained in the indictment. This
8 presumption of innocence was in his favor at the start of
9 the trial, it continued in his favor throughout the trial,
10 is in his favor even as I instruct you now, and continues
11 in his favor during the course of your deliberations in
12 the jury room. It is removed only if and when you, the
13 members of the jury, are satisfied that the government has
14 sustained its burden of proof beyond a reasonable doubt.

15 The question that naturally then comes up is
16 what is a reasonable doubt. The words almost define
17 themselves--that there is a doubt founded in reason and
18 arising out of the evidence in the case, or the lack of
19 evidence. It is a doubt which a reasonable person has
20 after carefully weighing all the evidence. Reasonable
21 doubt is a doubt which appeals to your reason, your
22 common sense, your experience and your judgment. It is not
23 caprice, whim, speculation or conjecture. It is not an
24 excuse to avoid the performance of an unpleasant duty.
25 It is not sympathy for a defendant.

1 GW6

2 If, after a fair and impartial consideration
3 of all the evidence, you can candidly and honestly say
4 that you are not satisfied of the guilt of the defendant,
5 that you do not have an abiding conviction of the defend-
6 ant's guilt--in sum, if you have such a doubt which would
7 cause you as prudent persons to hesitate before acting
8 in matters of important to yourselves--then you have a
9 reasonable doubt, and in that circumstance it is your duty
10 to convict.

11 On the other hand, if, after such a fair and
12 impartial consideration of all the evidence, you can
13 candidly and honestly say that you do have an abiding con-
14 viction of the defendant's guilt, such a conviction as
15 you would be willing to act upon in important matters
16 pertaining to the affairs of your own life, then you have
17 no reasonable doubt and in that circumstance it would be
18 your duty to convict.

19 One final word on this subject.

20 Reasonable doubt does not mean a positive cer-
21 tainty, or beyond all possible doubt. If that were the
22 rule, few persons, however guilty they might be, would be
23 convicted. It is practically impossible for a person to
24 be absolutely and completely convinced of any controverted
25 fact which by its nature is not susceptible of mathematical

1 GW7

2 certainty. In consequence, the law is in a criminal case
3 that it is sufficient if the guilt of a defendant is proved
4 beyond a reasonable doubt, not beyond all possible doubt.

5 A word about the law that is the subject of
6 the indictment and the difference between the counts in
7 the indictment.

8 The counts in the indictment charge violations
9 of the Drug Abuse, Prevention and Control Act. This law
10 was enacted by Congress in an effort to combat the illegal
11 importation, distribution, possession and improper use
12 of various drugs which have a substantial and detrimental
13 effect on the health and general welfare of the American
14 people.

15 Under that act, various drugs are classified
16 as "controlled substances" and are listed in different
17 schedules. These schedules include narcotic drugs as well
18 as other types. Marijuana, which is not a narcotic drug,
19 is included in Schedule I as a controlled substance.
20 Cocaine, which is a narcotic drug, is included in Schedule
21 II as a controlled substance.

22 The first count charges that Wooten and the
23 other defendants engaged in a conspiracy to violate the
24 Drug Control Law. I shall refer to the first count as
25 the conspiracy count.

1 GW8

2 The third count, to which I shall refer as
3 the substantive count, charges that Wooten and the other
4 defendants named therein committed an actual violation of
5 the law, which makes it unlawful for one to distribute
6 or possess with intent to distribute a controlled drug.

7 A conspiracy to commit a crime is an entirely
8 different and separate offense from the substantive crime
9 which is the objective of the conspiracy.

10 The essence of the crime of conspiracy is an
11 agreement or understanding to violate other laws. A con-
12 spiracy, which is sometimes referred to as a partnership
13 in crime, because it involves collective or organized
14 actions, presents a greater potential threat to the public
15 interest than the illicit activity of a single individual.
16 Group association or organized activity renders detection
17 more difficult than the instance of a single or lone
18 wrong doer.

19 Thus, because of the special dangers to the
20 community of conspiracies to distribute controlled drugs,
21 Congress enacted as part of the Drug Control Law a pro-
22 vision that a conspiracy to violate the act constitutes a
23 separate crime in addition to the substantive offense.

24 Count 1 is based upon a section of the law
25 which provides in pertinent part:

1 GW9

2 "Any person who....conspires to commit any
3 offense" in violation of the Drug Control Act is guilty
4 of a crime.

5 The actual violation of the act which is
6 charged in Count 3, the substantive crime, is based upon
7 another part of the act which in pertinent part reads:

8 "It shall be unlawful for any person knowingly
9 or intentionally ... to ... distribute or possess with
10 intent to ... distribute a controlled substance."

11 Another law which comes into play in this case
12 is known as the Aiding and Abetting Law, to which I shall
13 hereafter refer, which in general terms makes it a crime
14 for one to aid and abet another in the commission of a
15 crime.

16 Against this background of the applicable law,
17 we turn to a consideration of the specific counts in the
18 indictment. Since the essential elements which the govern-
19 ment must prove in order to sustain the respective charge
20 are different for each, we shall consider each separately.

21 As to the first or conspiracy count, the grand
22 jury charges:

23 "1. From on or about the 1st day of February,
24 1975, and continuously thereafter up to and including the
25 date of the filing of this indictment, in the Southern

1 GW10

2 District of New York, Romeo Petrillo, also known as Roy,
3 Margaret Petrillo, Vincent D. DiDonato, David McLean,
4 Randall Borchardt, William Wooten and John Kelley, the
5 defendants, and others to the grand jury unknown, unlawfully,
6 intentionally and knowingly combined, conspired, confederated
7 and agreed with each other to violate" and then there are
8 listed various sections of the Drug Control Act.

9 "2. It was part of said conspiracy that the
10 said defendants unlawfully, intentionally and knowingly
11 would distribute and possess with intent to distribute
12 Schedule I and II narcotic drug controlled substances,
13 the exact amount thereof being to the grand jury unknown,
14 in violation: and then again various sections of the act
15 are listed with relation to marijuana, cocaine controlled
16 substances."

17 Following that there is a listing of overt acts,
18 which I will again presently refer to.

19 In order to convict the defendant on trial,
20 the government must prove beyond a reasonable doubt the
21 following essential elements:

22 (1) the existence of the conspiracy as charged
23 in the indictment, that is, an agreement or understanding
24 to violate those provisions of law which prohibit the
25 distribution or possession with intent to distribute cocaine

1 GW11

[333] A-42

2 and marijuana;

3 (2) that the defendant knowingly associated
4 himself with and participated in the conspiracy; and

5 (3) that at least one of the conspirators
6 knowingly committed at least one of the overt acts set
7 forth in the indictment at or about the time and place
8 alleged.

9 Now let us consider under the first element
10 what is a conspiracy.

11 The idea of the conspiracy is simple. A con-
12 spiracy is a combination, agreement or understanding of
13 two or more persons, by concerted action, to accomplish a
14 criminal or unlawful purpose, in this instance, to dis-
15 tribute or possess with intent to distribute controlled
16 substances, to wit, cocaine and marijuana. The gist of
17 the crime is the unlawful combination or agreement to
18 violate the law. The success or failure of the conspiracy
19 is immaterial to the question of the guilt or innocence
20 of a conspirator.

21 However, in this case the government claims
22 the conspiracy was successful in that cocaine was dis-
23 tributed in consummation of sales.

24 To establish a conspiracy, the government is
25 not required to show that two or more persons sat around

1 GW12

2 the table and entered into a solemn pact, orally or in
3 writing, stating that they formed a conspiracy to violate
4 the law or setting forth the details or the means by which
5 its object was to be achieved. Common sense will tell you
6 that when persons in fact undertake to enter into a
7 criminal conspiracy much is left to the unexpressed under-
8 standing.

9 It is rare that a conspiracy can be proved by
10 direct evidence. What the evidence must show in order
11 to establish that a conspiracy existed is that two or more
12 persons in some way or manner, through any contrivance,
13 impliedly or tacitly, came to a common understanding to
14 violate the law or to accomplish an unlawful plan.

15 In determining whether there has been an
16 unlawful agreement, you may judge acts and conduct of the
17 alleged co-conspirators which are done to carry out an
18 apparent criminal purpose.

19 The adage "Actions speak louder than words"
20 is applicable here.

21 Usually, the only evidence available is that
22 of disconnected acts and conduct on the part of the alleged
23 conspirators, which acts and conduct, however, when taken
24 together with each other and considered as a whole,
25 permit an inference that a conspiracy existed as conclusively

1 GW13

2 as by direct proof. You must first determine whether or
3 not the proof establishes the existence of the conspiracy
4 as charged in the indictment.

5 In deciding the first element, you consider
6 all evidence which has been admitted with respect to the
7 conduct, acts and declarations of each alleged co-conspirator
8 and such inferences as may be reasonably drawn therefrom.

9 It is sufficient to establish the existence of
10 the conspiracy if, from the proof of all relevant facts
11 and circumstances, you find beyond a reasonable doubt that
12 the minds of at least two co-conspirators met in an under-
13 standing way to accomplish, by the means alleged, one or
14 more of the objects of the conspiracy as charged in the
15 indictment.

16 If you do conclude that the charged conspiracy
17 did exist, you next determine the second element, whether
18 the defendant on trial was a member of the conspiracy.
19 His participation in the conspiracy, if you find one did
20 exist, must be established by the independent evidence of
21 his own acts, statements and conduct, as well as those of
22 the other alleged co-conspirators and the reasonable
23 inferences to be drawn therefrom.

24 To find the defendant guilty of the conspiracy,
25 you must find beyond a reasonable doubt that, aware of the

1 GW14

2 existence of the conspiracy and of its purposes, he was a
3 willing participant with the intent to advance its purposes.

4 To become a member of a conspiracy, a defendant
5 need not know all the other members, their respective
6 roles in it, nor all the details of the conspiracy.

7 Thus, in this case the proof indicates that
8 the defendant knew only Borchardt, one of the alleged
9 co-conspirators.

10 Each member of a conspiracy may perform separate
11 and distinct acts and at different times. Some conspirators
12 may play major roles, while others play minor parts. In
13 a word, it is not required that a person be a member of
14 the conspiracy from its very start. A single act may be
15 enough to draw one within the ambit of the conspiracy,
16 provided the proof establishes that, aware of the conspiracy,
17 he knowingly associated himself with it and participated
18 therein.

19 However, mere knowledge or acquiescence in the
20 object or the purpose of the conspiracy is not sufficient.
21 More is required. This "something more" is generally
22 described as a stake in the venture or a stake in its
23 outcome. While a financial stake in a venture is not
24 essential, if you do find that the defendant had such an
25 interest, this is a factor that may be considered by you

1 GW15

2 in deciding whether or not he was a member of the conspiracy,
3 if you find one existed.

4 One may join an existing conspiracy at any
5 point during its progress, and however limited his role
6 he is responsible for all that had been done even before
7 he joined and that may be done thereafter in furtherance
8 of its objectives.

9 For example, in this case the government does
10 not claim that Wooten was a member of the conspiracy in
11 late February, 1975, when it alleges it had its onset.
12 To establish his participation in the conspiracy it has
13 offered evidence of Wooten's alleged acts and conduct on
14 March 9th and then on the next day, March 10, 1975.

15 To establish that the conspiracy existed
16 earlier and continued, it has offered evidence of the
17 acts and conduct of Borchardt and other alleged co-conspira-
18 tors in furtherance of the alleged conspiracy that occurred
19 on or about February 27, 1975, also thereafter including
20 those events which took place on March 10, 1975, in the
21 Third Avenue apartment participated in by Borchardt,
22 Petrillo and McLean.

23 Should you find that defendant, as defined in
24 these instructions, became a participant in the conspiracy
25 on March 9th or March 10th, then he is responsible for all

1 GW16

2 that was done in furtherance of the conspiracy during its
3 continuance.

4 A conspiracy has sometimes been described as
5 a partnership in criminal purposes. Simply stated, by
6 becoming a partner he assumed all the previous liabilities
7 of the partnership.

8 Once you are satisfied beyond a reasonable
9 doubt that a conspiracy existed and that the defendant on
10 trial became a member, then the acts and declarations of
11 any other person found to be a member, made during the
12 pendency of the conspiracy and in furtherance of its
13 objectives, are considered and acts and declarations of
14 the defendant.

15 Thus, if you find a conspiracy as charged
16 existed of which Borchardt was a member, then the distri-
17 bution of marijuana or possession of marijuana with intent
18 to distribute, or any sale of cocaine made by Borchardt
19 or any discussion, or act of his to further or arrange
20 such a distribution or sale would be binding on Wooten,
21 the defendant on trial, if you further find that he was a
22 member of the conspiracy. This would be so even if such
23 acts were committed when the defendant was not present.

24 Accordingly, if you find that a sale of cocaine
25 was made to Greenan, the undercover agent, in the apartment

1 GW17

2 at Third Avenue and further find that a conspiracy existed
3 to effect the sale of which Borchardt and Wooten were
4 members, the sale would be binding on Wooten even though
5 he was not present.

6 Summing it up in a simple way, if in fact
7 there is a partnership in crime, each partner acts and
8 speaks for the other in the furtherance of the partnership
9 business whether or not the other was present.

10 The existence of a conspiracy and one's member-
11 ship therein may be established by direct evidence or
12 circumstantial evidence.

13 These are rarely susceptible of proof by
14 direct evidence. Usually they are established as a matter
15 of reasonable inference based upon circumstantial evidence.

16 Direct evidence is where a witness testified
17 to what he saw, heard and understood and what he knows of
18 his own knowledge, that which comes to him by virtue of
19 his senses.

20 Circumstantial evidence is where facts are
21 established from which, in terms of common experience, one
22 may logically infer other facts that are sought to be
23 established. Circumstantial evidence, if believed, is
24 of no less value than direct evidence, for in either case
25 you must be convinced beyond a reasonable doubt of the

1 GW18

2 guilt of the defendant before a conviction may be had.

3 In this case, the government relies upon both
4 direct and circumstantial evidence. Whether the defendant
5 knowingly and intentionally participated in the claimed
6 conspiracy presents issues of fact. These issues concern
7 what is in one's mind. Medical science has not yet devised
8 an instrument whereby we can go back to the time of the
9 occurrence of events and determine what was a person's
10 intent or knowledge. These are determined from one's acts,
11 his conduct and surrounding circumstances and such
12 inferences as may be reasonably drawn therefrom.

13 I have often said to juries the state of a
14 person's mind is as much a fact as the state of his
15 digestion, and that is the fact issue you are called upon
16 to decide.

17 If you find circumstances of secrecy, intrigue,
18 attempts to conceal the true nature of a transaction or
19 false exculpatory statements, these may be considered by
20 you as circumstantial evidence of criminal intent, or
21 guilty knowledge.

22 A final word of caution.

23 Mere association of the defendant with an alleged
24 conspirator or conspirators does not establish his participa-
25 tion in a conspiracy, if you find one did exist. So, too,

1 GW19

2 mere knowledge by the defendant of the conspiracy or any
3 illegal act on the part of other alleged co-conspirators
4 is not sufficient to establish the defendant's membership
5 in the conspiracy.

6 Before the inference may be drawn that the
7 defendant was a member of the conspiracy, you must, as I
8 have already instructed you, be satisfied from the evidence
9 presented by the government that he knowingly associated
10 himself with the conspiracy with the specific intent to
11 aid the accomplishment of its unlawful purpose.

12 I have already mentioned the third essential
13 element of the crime of conspiracy is that an overt act
14 intended to effect the object of the conspiracy be committed
15 by at least one of the co-conspirators after the unlawful
16 agreement has been made.

17 An overt act is any step, action or conduct
18 which is taken to achieve, accomplish or further the
19 objective of the conspiracy. The overt act need be neither
20 a criminal act, nor the very crime which is the object
21 of the conspiracy.

22 Thus, in this case, the overt acts listed in
23 the indictment are, under the heading "Overt Acts":

24 "In pursuance of said conspiracy and to effect
25 the objects thereof, the following overt acts were committed

1 GW20

2 in the Southern District of New York and elsewhere.

3 "1. On or about February 27, 1975, defendants
4 Romeo Petrillo, also known as Roy, Vincent DiDonato and
5 David McLean met at 121-6 Freedom Avenue, Staten Island,
6 New York, and delivered approximately one-eighth of a
7 kilogram of cocaine.

8 "2. On or about March 7, 1975, defendants
9 Randall Borchardt, David McLean and Romeo Petrillo possessed
10 approximately three ounces of cocaine.

11 "3. On or about March 10, 1975, defendants
12 William Wooten and Randall Borchardt took a taxicab to
13 1687 Third Avenue, New York, New York.

14 "4. On or about March 10, 1975, defendants
15 Randall Borchardt, Romeo Petrillo, also known as Roy, and
16 David McLean met in Apartment 2-S, 1687 Third Avenue, New
17 York, New York.

18 "5. On or about March 10, 1975, defendants
19 William Wooten and Randall Borchardt met in the vicinity
20 of Jimmy Murray's Bar, 94th Street and Third Avenue, New
21 York, New York.

22 "6. On or about March 10, 1975, defendant
23 Randall Borchardt delivered approximately seven ounces of
24 cocaine.

25 "7. On or about March 10, 1975, defendants

1 GW21

2 Romeo Petrillo, also known as Roy, and David McLean received
3 \$200.

4 "8. On or about May 5, 1975, defendant Randall
5 Borchardt possessed approximately 20 pounds of marijuana."

6 You will observe that some of these overt acts
7 refer to criminal conduct, allegedly the objective of the
8 conspiracy, such as the distribution of cocaine to
9 purchasers. Other overt acts upon the surface appear
10 innocent. Thus, for Wooten and Borchardt to take a
11 taxicab to the area of 1687 Third Avenue, New York City,
12 and for them to meet in the vicinity of Jimmy Murray's
13 Bar at 94th Street and Third Avenue is not necessarily, in
14 and of itself, criminal conduct. But if, as the government
15 charges, the taxi ride and the meeting in the vicinity of
16 the bar was for the purpose of furthering and concluding
17 a sale of cocaine, then the ride and the meeting shed their
18 outward innocent appearing purpose and become overt acts
19 to further the purpose of an illegal enterprise.

20 It is not necessary for the government to prove
21 that each member of the conspiracy committed or parti-
22 cipated in the particular overt act, since the act of any
23 one alleged co-conspirator done in furtherance of the
24 conspiracy becomes the act of all the other members.

25 Also, the government is not required to prove

1 GW22

2 each of the overt acts alleged in the indictment. It is
3 sufficient if it proves the commission of at least one of
4 the overt acts at or about the time alleged, in the Southern
5 District of New York.

6 I charge you that the Borough of Manhattan is
7 within the Southern District of New York.

8 A final word.

9 While the indictment charges that the conspiracy
10 existed from on or about the 1st day of February, 1975,
11 and continuously to July 7, 1975, the date of its filing,
12 it is not essential that the government prove that the
13 conspiracy started and ended on or about those specific
14 dates. It is sufficient if you find that in fact a con-
15 spiracy was formed and existed within the period set forth
16 in the indictment and that at least one of the overt acts
17 was committed in furtherance thereof within that period.

18 In sum, under the conspiracy count, in order
19 to convict the defendant, you must find beyond a reasonable
20 doubt:

21 (1) the existence of the conspiracy as charged;

22 (2) a knowing participation in that conspiracy
23 by him; and

24 (3) the commission of at least one overt act
25 in the Southern District of New York.

Now let us turn to the substantive charge in Count 3 of the indictment, which reads:

"The Grand Jury further charges:

"On or about the 10th day of March, 1975, in the Southern District of New York, Randall Borchardt, William Wooten, David McLean and Romeo Petrillo, also known as Roy, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, approximately 195.32 grams net weight of cocaine."

I have already read to you the law upon which this substantive violation is based. It is desirable to read it again. It provides in pertinent part:

"It shall be unlawful for any person knowingly or intentionally ... to ... distribute ... or possess with intent to ... distribute ... a controlled substance."

In order to find the defendant guilty under this count, the government must establish beyond a reasonable doubt:

(1) that on or about the date charged therein he distributed, or possessed with intent to distribute, cocaine, a narcotic controlled substance;

(2) that he did so knowingly or intentionally. This means that he knew what he was doing, that the dis-

1 GW24

2 tribution or possession with intent to distribute was
3 deliberate and purposeful, that his acts or conduct were
4 calculated and were not due to inadvertence, negligence
5 or mistake;

6 (3) that the substance in Government's Exhibit
7 1 was in fact cocaine, a narcotic controlled substance.

8 I charge you that cocaine is a narcotic
9 controlled substance.

10 Here the government has offered the testimony
11 of a chemist that the contents of the exhibit includes
12 cocaine.

13 A few words about what is meant by "distributing
14 or possessing with intent to distribute."

15 You will note under the first element the offense
16 is either the distribution or possession with intent to
17 distribute a narcotic drug. The word "distribution" is used
18 in its ordinary sense. It simply means to transfer, to
19 pass on, to hand over to another.

20 The word "possess" means to have something within
21 your control. This does not necessarily mean that you
22 must hold it physically. As long as an object is under
23 your control, you possess it.

24 And the word "intent" refers to a person's
25 state of mind.

1 GW25
2 So the term "possess with intent to distribute"
3 means to control an item with the state of mind or purpose
4 to transfer or pass that item or deliver it to another
5 person. That purpose may involve a contemplated sale,
6 but a sale is not required. In this case, however, the
7 government contends the possession with intent to distribute
8 was to effect a sale.

9 A further instruction on the word "possession."

10 Possession may be of two types, actual or con-
11 structive. Actual possession means that a person knowingly
12 has personal, manual or physical control of the narcotics.

13 Constructive possession exists where the nar-
14 cotics are in the physical possession of or handled by
15 another person , but a defendant, the person alleged to
16 have constructive possession, has the power to exercise
17 control over the narcotics or their distribution, their
18 movement, or to set the price for their sale or to cause
19 their delivery.

20 So, too, one who has a working relationship
21 with another who has physical custody of narcotics so as to
22 cause or effect their delivery to a prospective purchaser
23 in consummation of a sale may be said to have constructive
24 possession of the narcotics.

25 In this case, the government makes separate

1 GW26
2 contentions under the third count. First, it urges Wooten
3 necessarily had actual physical possession of three ounces
4 of cocaine, which it contends was handed over to him by
5 Borchardt upon leaving the taxicab in which both had
6 arrived at the Third Avenue area; that Wooten continued
7 in physical possession of the cocaine during the period
8 that Borchardt was in the apartment negotiating the sale
9 of seven ounces with the undercover agent; and that Wooten
10 had such possession until he handed over the three ounces
11 to Borchardt to consummate a unit sale of seven ounces of
12 cocaine to the agent.

13 If, upon all the evidence, you are satisfied
14 that Wooten had physical possession of the three ounces
15 of cocaine, that he knew it was cocaine, which was to be
16 part of a larger quantity to be sold to the undercover agent,
17 and further find the government has established beyond a
18 reasonable doubt the essential elements, that would be
19 sufficient to convict him.

20 But entirely apart from the foregoing, the govern-
21 ment further contends that the defendant had constructive
22 possession based upon his alleged financial interest in the
23 distribution of the cocaine and his alleged working relation-
24 ship with Borchardt to consummate the sale of the cocaine
25 to Greenan in which he, Wooten, was to share in the proceeds.

1 GW27

2 The government here does not claim--indeed it
3 cannot, that there is proof that Wooten was present in
4 McLean's apartment during the negotiations for sale--that
5 he had physical possession of the seven ounces of cocaine
6 at the time of the consummation of the sale, or that he
7 there physically distributed it.

8 To further establish its charge under the third
9 count against Wooten, the government also relies upon the
10 Aiding and Abetting Law to which I made earlier reference
11 and which provides:

12 "Whoever commits an offense against the United
13 States or aids, abets, counsels, commands, induces or
14 procures its commission, is punishable as a principal."

15 This is a rule of criminal responsibility for
16 acts which one assists another in performing.

17 Thus, not only is the person who commits an
18 illegal act guilty, but anyone who consciously shares in
19 and furthers a criminal act. In short, two or more persons
20 may be involved in the commission of a crime. Their
21 roles may be different and yet each may be held responsible.

22 To aid and abet another to commit a crime, it
23 must be shown beyond a reasonable doubt that a defendant
24 in some way knowingly associated himself with and furthered
25 the criminal venture of one who actually commits the crime,

1 GW28

2 intending it succeed. In other words, if one, fully aware
3 of what he is doing, plays a significant role in facilitating
4 or furthering a transaction prohibited by law, then that
5 person is equally guilty with the person who directly per-
6 formed the illegal act, even though the latter played a
7 much greater or major part in the perpetration of the crime.

8 However, knowledge that a crime is being
9 committed or presence at the scene by themselves do not
10 establish that a defendant is an aider and abettor. The
11 companion of a person engaged in a crime is not an aider
12 and abettor merely because he furnishes company to the
13 person engaged in a crime. More is required to establish
14 that one is an aider and abettor. There must be proof
15 that the defendant did something to forward the crime.

16 The government contends that the defendant had
17 a financial interest in part of the sale proceeds of the
18 cocaine and that his going with Borchardt to the area of
19 the sale and his possession for a period of time of a
20 portion of the total cocaine allegedly sold on that occasion
21 was to protect his financial interest and to receive his
22 share of the proceeds of the sale.

23 To determine whether the defendant aided and
24 abetted the commission of an offense, you may ask
25 yourselves: Did Wooten accompany Borchardt to the area

1 GW29

2 of 1687 Third Avenue, and was he there while Borchardt
3 was in the apartment? And, if so, why?

4 If you find that Wooten associated himself with
5 the venture that Borchardt was engaged in, that he par-
6 ticipated in it as something he wished to bring about, and
7 that he sought by his action to make it succeed, then you
8 have sufficient upon which to find he was an aider and
9 abettor.

10 Accordingly, you may find Wooten guilty of the
11 offense charged if you find beyond a reasonable doubt that
12 Borchardt was the principal who distributed the cocaine
13 or possessed it with intent to distribute and that Wooten
14 aided and abetted him, provided, of course, the government
15 also establishes beyond a reasonable doubt the other
16 elements.

17 To make such a finding, you must be satisfied
18 beyond a reasonable doubt that, aware that the narcotics
19 were being illegally distributed or sold, Wooten knowingly
20 and intentionally played a significant role in furthering
21 the transaction--that he was not merely a spectator or
22 innocent bystander or had merely accompanied Borchardt on
23 a taxi ride. If you are not so satisfied, then he cannot
24 be held as an aider and abettor.

25 Against that background of the law, let us

1 GW30

2 turn to the testimony with respect to the charges. I
3 will only briefly outline the evidence and the contentions
4 upon which the parties rely. In their summations, counsel
5 summed up extensively and reviewed the testimony of various
6 witnesses. To again review in detail the testimony of
7 each witness would be unnecessary repetition.

8 The government, to establish its burden under
9 the conspiracy and substantive counts, relies principally
10 upon the testimony of the undercover agent, Greenan, and
11 co-defendant Borchardt, who testified to cocaine and
12 marijuana-related transactions before March 10, 1975, to
13 establish that the conspiracy had its onset prior to that
14 date.

15 Greenan testified to a transaction on February
16 27,, 1975, and to establish defendant's role and participa-
17 tion in the conspiracy, the government relies upon
18 Borchardt's testimony of their discussion on March 9, 1975,
19 and further upon the evidence of events on March 10th, which
20 it offers in support of both the conspiracy and the sub-
21 stantive charges against the defendant.

22 In sum, the government contends that all the
23 evidence establishes that defendant was a knowing partici-
24 pant in the conspiracy, aware of its purposes and objectives,
25 and also in the substantive crime, which it charges was

1 GW31

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2 in furtherance of the conspiracy.

3 The government further stresses that defendant
4 had a substantial financial interest in the sale of cocaine
5 on March 10th. In substance, it contends that although
6 \$2,000 was loaned by defendant to Borchardt on March 9th
7 to further a marijuana transaction, when that fell through
8 Wooten was advised by Borchardt of a pending cocaine deal,
9 was shown the cocaine and that thereupon Wooten knowingly
10 associated himself with the enterprise to obtain the
11 return of his loan as well as a profit, and that he went
12 to the Third Avenue area to assist in the furtherance and
13 consummation of the sale of seven ounces of cocaine in the
14 protection of his financial interest.

15 In addition to the foregoing, the government
16 relies upon circumstantial evidence to support the charge.
17 It has offered evidence that Wooten sought to have Borchardt
18 give false testimony as to his, Wooten's, alleged role in
19 the cocaine transaction, and to have him deny he knew
20 anything about it.

21 If you do so find, then you may consider this
22 as evidence of defendant's consciousness of guilt. So,
23 too, if you find that the statements concerning the
24 pictures taken of him on March 10th were false and intended
25 by Wooten as exculpatory, that too may be considered by

2 you as evidence of consciousness of guilt.

3 The defendant challenges the government's case.
4 He relies upon the presumption of innocence in his favor;
5 he points to contradictions in evidence offered by the
6 government witnesses; to prior inconsistent statements by
7 them; and also, in some instances, to disparities between
8 the testimony of Greenan and Borchardt. He attacks the
9 credibility of the principal witnesses against him. He
10 contends that the government's case does not establish
11 guilt beyond a reasonable doubt.

12 I have not adverted to all the evidence upon
13 which the government and defendant rely to support their
14 respective contentions which were advanced to you in their
15 summations. All evidence, whether or not I have referred
16 to it, is important and must be considered by you. In my
17 reference to testimony, I sought to state the substance
18 thereof with complete accuracy. However, if perchance any
19 reference to testimony does not agree or accord with your
20 own recollection, and as I stated at the very start of
21 these instructions, you are to disregard such references
22 by me, and I emphasize this as strongly as words can convey.
23 Always it is your recollection and yours alone that governs.

24 You are called upon to decide the fact issues
25 here, which requires you to pass upon the credibility of

1 GW33

2 witnesses. How do you decide this? I mentioned at the start
3 of the trial that it would be desirable and important for you
4 not only to listen but to look at witnesses as they testify.
5 Your determination of the issue of credibility very largely
6 must depend upon the impression that a witness made upon you
7 as to whether or not he was telling the truth or giving you
8 an accurate version of what occurred.

9 I often say to jurors, when you walk in the door
10 of this courtroom and sit in the jury box while the trial is
11 going on and later when you are deliberating in the jury room,
12 you have with you your common sense, your good judgment and
13 your experience.

14 You decide whether or not a witness was straight-
15 forward and truthful, whether he attempted to conceal any-
16 thing, whether he has a motive to testify falsely, whether
17 there is any reason why he might color his testimony. But
18 the ultimate question, taking into account inconsistencies
19 and other matters for you to decide in passing upon credibility
20 is did the witness tell the truth before you as to essential,
21 material matters. It is for you to say whether a witness
22 at this trial was truthful in whole or in part in the light
23 of his demeanor and all the evidence in the case.

24 Borchardt, by his own admission, was a participant
25 and accomplice in the conspiracy charged in the indictment.

1 GW34

2 He has pled guilty to the conspiracy charged against him
3 and, as I have already noted, that is his personal plea of
4 guilty and is binding only upon him.

5 In certain types of crime the government of
6 necessity is frequently compelled to rely upon the testimony
7 of accomplices. Otherwise it would be difficult to detect
8 and prosecute some wrongdoers, and this is particularly
9 true in conspiracy cases. Often the government has no
10 choice in the matter. It must take the witnesses to the
11 transactions as they are.

12 There is no requirement in the federal court
13 that the testimony of an accomplice be corroborated. It
14 by no means follows that simply because one is an accomplice
15 he is not capable of giving a truthful version of events.
16 A conviction may rest upon the uncorroborated testimony of
17 such a witness if it is found credible.

18 However, the testimony of a witness who is an
19 alleged accomplice should be viewed with great caution
20 and scrutinized carefully.

21 The ultimate question, I repeat, is: Did
22 Borchardt tell the substantial truth before you? Was his
23 testimony induced by promise? Was the testimony induced
24 by a belief that he will receive favorable consideration upon
25 his sentence on his plea of guilty or has he, under the

1 GW35

2 oath taken in your presence, made a clean breast of his
3 wrongdoing as a matter of conscience and told the truth of
4 significant events? Has he, in the parlance of the day,
5 come clean?

6 If you find his testimony was deliberately
7 untruthful, you should unhesitatingly reject it. On the
8 other hand, if you are satisfied that he gave a truthful
9 version of events and that, upon the totality of the
10 evidence, the government has sustained its burden of proof
11 as outlined in these instructions, then you have sufficient
12 upon which to convict.

13 However, the government contends that entirely
14 apart from Borchardt's evidence the testimony of the law
15 enforcement agents is sufficient to sustain the charge.

16 The fact that the agents were law enforcement
17 officers does not require that you give their testimony
18 greater weight or credence than that accorded the testimony
19 of any other witness. Their credibility is to be judged
20 by the same standards applied to other witnesses who
21 testified, taking into account their manner, demeanor,
22 motives and other factors which bear on credibility.

23 If you find that a witness has wilfully testified
24 falsely to any material fact, you have a right to reject
25 the testimony of that witness in totality or to accept

1 GW36

2 only that part or portion which commends itself to your
3 belief or which you may find corroborated by other evidence
4 in the case.

5 The defendant has not testified in this case.
6 This is his absolute right, and in no respect may it be
7 considered by you as any evidence against him or as a basis
8 for any presumption or inference unfavorable to him. You
9 must not permit that fact to enter into your deliberations
10 or discussion.

11 The government to prevail must, with respect
12 to each count, prove the essential elements by the required
13 degree of proof, as already explained in these instructions.
14 If it succeed as to a particular count, your verdict
15 should be guilty. If it fails, it should be not guilty.

16 You must consider each count separately and
17 render a separate verdict as to each count. The verdict
18 in each instance must be unanimous. Thus, your verdict
19 may be guilty on both counts, not guilty on both counts,
20 guilty on one and not guilty on the other, as the case
21 may be.

22 Your function is to weigh the evidence in the
23 case and to determine the guilt or innocence of the defend-
24 ant solely on the basis of such evidence and these instruc-
25 tions. Under your oath as jurors, you cannot allow a

1 GW37

2 consideration of the sentence which may be imposed upon
3 the defendant, if he is convicted, to enter into your
4 deliberations or to influence your verdict in any way.
5 Your duty is to decide the case solely and only on the
6 evidence. In the event the evidence warrants a conviction,
7 the duty of imposing sentence rests solely with the Court.

8 Each juror is entitled to his or her own opinion,
9 but each should, however, exchange views with fellow jurors.
10 That is the very purpose of jury deliberation, to discuss
11 and consider the evidence, to listen to arguments of fellow
12 jurors, to present your individual views, to consult with one
13 another, and to reach an agreement based solely and wholly
14 on the evidence. Each must decide the case for himself
15 or herself after consideration with his or her fellow jurors.

16 If you have a point of view that differs from
17 that of fellow jurors and after further discussion and
18 consideration of the evidence you are persuaded that an
19 originally held point of view should yield in the light of
20 the evidence and the law, there is no reason why you should
21 not change a point of view, provided always it reflects your
22 own conscientious judgment as to how the case should be
23 decided.

24 Now, if the evidence warrants a verdict of
25 guilty, you must not flinch from your duty. On the other

1 GW38

2 hand, if the government has failed to sustain its burden
3 of proof, equally it is your duty to find the defendant
4 not guilty.

5 You may wait where you are. There are matters
6 on which counsel may wish to see the Court. If so, I
7 will see you in the robing room.

8 (In robing room.)

9 THE COURT: You may state your exceptions, Mr.
10 Michaels.

11 MR. MICHAELS: Your Honor, I would like to
12 except to the charge as stated thus far first on the
13 ground the Court has informed the jury within the context
14 of Count 1 that the count charges that the purpose of the
15 conspiracy under paragraph 2 was to distribute and possess
16 with intent to distribute Schedule I and II narcotic drug
17 controlled substance, and has further instructed the jury
18 that marijuana is not included within that definition
19 but has thus far failed to inform the jury of the inference
20 of deduction therefrom can be no conviction based solely
21 on marijuana under Count 1, which we urge would be an
22 appropriate conclusion and perhaps necessary in order to
23 make it clear to them just what categorization by schedule
24 means in terms of this case.

25 THE COURT: I don't understand what you mean

1 GW39

2 by your statement.

3 MR. MICHAELS: Your Honor, the problem may be
4 that the jury may believe that Mr. Wooten was involved in
5 some way with some marijuana conspiracy but not a cocaine
6 conspiracy.

7 THE COURT: The evidence is so clear as far as
8 he is concerned that it's principally a cocaine-related
9 transaction that I don't understand what you are saying.

10 MR. MICHAELS: We would ask there cannot be a
11 conviction under Count 1 solely from marijuana because they
12 may believe he was guilty as to marijuana.

13 THE COURT: If he attached himself to the
14 conspiracy which existed with respect to both, he would
15 become a member of the conspiracy and liable for everything
16 that was done in furtherance of it.

17 Let's not argue it any further. The charge
18 will stand as it is.

19 MR. MICHAELS: Let the record reflect that we
20 have previously requested that the jury be charged as to
21 duress and the force of circumstances respecting the
22 voluntary nature of an act.

23 THE COURT: I am not going to let this record
24 go unchallenged now. You make whatever statement you
25 want with respect to exceptions.

1 GW40

2 MR. MICHAELS: And that in a conversation with
3 the Court's law clerk on the first day of trial, that
4 being last Thursday, where we were asked to present
5 comments upon the jury charges requested by the government,
6 that we included there within our request that the jury
7 be charged as to the voluntary nature of an act or the
8 involuntary nature of an act as affected by pressure of
9 circumstances or duress.

10 Further, we would like to ask the jury be
11 charged as to simple possession.

12 These are our exceptions to the charge.

13 However, we have one further exception and such
14 relating to the factual review as stated by the Court in
15 that the Court stated that the government has shown, I
16 believe, but the Court may have stated that the government
17 had contended -- I am uncertain at the moment -- that
18 the money was lent here for a marijuana deal which then
19 fell through.

20 In fact, there has been testimony from the
21 same government witness of two alternate and contradictory
22 reasons for the provision of money by the defendant, one
23 being that it was for marijuana, the other being that it
24 was to help him get out of debt when he was under pressure.

25 No explanation of this distinction or difference

1 GW41

2 has been provided but we would urge that in order to be
3 completely even-handed it would be preferable if the jury
4 were to be charged that in fact there has been conflicting
5 testimony and not that there has been clear testimony as
6 to one point of view.

7 Further, I note that in the latter part of its
8 charge the Court made reference to the possibility that
9 Mr. Wooten had asked Mr. Borchardt to lie. In fact, in
10 my recollection of the testimony, it was, while the
11 question to such effect was asked, Mr. Borchardt had stated
12 in fact he had been asked simply to tell the truth and
13 not to lie. If my recollection is incorrect, I will stand
14 corrected, but that is my recollection and I would ask
15 that there be some clarification made and that the jurors
16 may recall it as I do.

17 THE COURT: Have you finished?

18 MR. MICHAELS: Yes.

19 THE COURT: First I said I am going to not allow
20 the record to go unchallenged with respect to your refer-
21 ence to requests.

22 You did not submit any written requests although
23 I specified the time by which they were to be submitted.

24 MR. MICHAELS: True.

25 THE COURT: I made it perfectly clear to you

1 GW42

2 that any comment or discussion you had with my law clerk
3 could not constitute a request, that that discussion
4 related solely to the government's requests, written
5 requests, which had been submitted and your comments were
6 invited.

7 It is perfectly clear there was no compliance
8 with the rule and a failure to comply with my request that
9 you submit written requests for instructions as required
10 by the rules, and I am certainly not going to take any
11 oral requests to charge. I indicated that to you Friday.
12 I just don't understand why a lawyer would not follow the
13 rules.

14 Now, insofar as your other exceptions are
15 concerned, some of these go to the factual review. I have
16 already made it clear to the jury that their recollection
17 of the evidence governs and it isn't anything that the
18 lawyers said or anything the Court may say about the facts.

19 Your exceptions are noted on the record as you
20 gave them.

21 (In open court.)

22 THE COURT: Members of the jury, there has
23 been a suggestion by defense counsel that I didn't
24 accurately state with reference to some of the contentions
25 as to the facts.

1 GW43
2 I tried to impress upon you that I adhered
3 to the record as closely as I could, but that if any
4 fact matter I referred to was not in accord with your own
5 independent recollection, to rely entirely upon your
6 recollection and to reject whatever I have said as to a
7 fact matter, and I repeat that again as strongly as I can.
8 It is your recollection and yours alone that governs.

9 Also, if there are in the record any matters
10 which go beyond what I have said, I have indicated to you
11 clearly that you must consider all the evidence in the case.
12 All evidence is important and it doesn't make any difference
13 whether counsel failed to refer to evidence during the
14 course of their summations or whether I didn't touch upon
15 all the evidence. Your duty is to consider all the
16 evidence in the case.

17 (Marshal sworn.)

18 THE COURT: Off the record.

19 (Discussion off the record.)

20 THE COURT: Let the record indicate a copy of
21 the indictment was given to the jury.

22 You may go inside, members of the jury.

23 (At 11:25 A. M., the jury retired to the
24 jury room to deliberate.)
25

1 GW44

2 MR. SCHATZ: I am handing up to the Court Govern-
3 ment's Exhibit 3500 for identification, which is a list
4 of 3500 information handed to defense counsel. I have
5 shown defense counsel a copy of this list.

6 (At 4:15 P. M., the jury returned to the
7 courtroom.)

8 THE CLERK: Members of the jury, please answer to
9 your presence as your name is called.

10 (Jury roll call.)

11 THE CLERK: Madam Forelady, has the jury agreed
12 on a verdict?

13 THE FORELADY: They have.

14 THE CLERK: How do you find the defendant, William
15 Wooten, as to Count 1?

16 THE FORELADY: Guilty.

17 THE CLERK: How do you find the defendant, William
18 Wooten, as to Count 3?

19 THE FORELADY: Guilty.

20 THE CLERK: Madam Forelady, listen to your verdict
21 as it stands recorded. You say you find the defendant,
22 William Wooten, guilty as to Count 1 and guilty as to
23 Count 3, and so say you all?

24 THE JURORS: Yes.

25 THE COURT: Any requests?

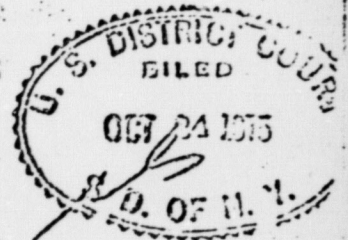
A-76

October 22, 1975

To Judge Weinstein.

RE: The U.S. VS. Wooten, Case Ending 10/20/75

75 G. 670



Your Honor:

I believe your charge to the jury that was you may find the defendant

- (1) guilty on both counts, 1 and 3
- (2) guilty on count 1, not guilty on 3
- (3) guilty on count 3, not guilty on 1
- (4) not guilty on either counts 1 or 3.

and that we should have voted separately on each count.

I was intimidated and regretfully considered both counts, 1 and 3, together, not as separate issues, not only to the disadvantage to the defendant but also to our jury system.

Please note I do not thank you for your consideration in this matter. I feel it is your duty to all.

Respectfully,

Patrick J. Treton

Patrick J. Treton

MICROFILM

OCT 24 1975

A-77

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
NEW YORK, N. Y. 10007

CHAMBERS OF
JUDGE EDWARD WEINFELD

October 22, 1975

Paul J. Curran, Esq.
United States Attorney for the
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10005

Attention: Steven Schatz, Esq.

David S. Michaels, Esq.
342 Madison Avenue
New York, New York 10017

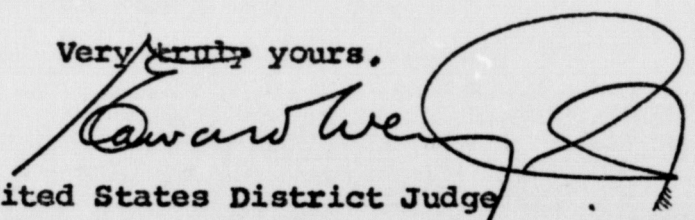
Re: United States v. Wooten
75 Cr. 670

Dear Sirs:

I enclose for your information letter received this day from Patrick J. Treston, a juror in the above trial. I have directed that the original be filed with the official court file.

Since the substance of the letter seeks to impeach the jury's verdict, the court does not propose to take any action thereon. See McDonald v. Pless, 238 U.S. 264 (1915); United States v. Dioguardi, 492 F.2d 70 (2d Cir. 1974); Poindexter v. Groves, 197 F.2d 915 (2d Cir. 1952); United States v. Grieco, 161 F. Supp. 683, 684 (S.D.N.Y.), aff'd, 261 F.2d 414 (2d Cir. 1958), cert. denied, 359 U.S. 907 (1959).

Very truly yours,


United States District Judge

cc: Mr. Patrick J. Treston

DEFENDANT

WILLIAM WOOTEH

DOCKET NO. 75

CRIM 670 (C)

In the presence of the attorney for the government
the defendant appeared in person on this date

MONTH	DAY	YEAR
NOVEMBER	21	1975

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL

DAVID S. NICHOLS, ESQ.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☒ NOT GUILTYFINDING &
JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged

☒ GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, Cocaine. (Title 21, United States Code, sections 812, 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.) And conspiracy so to do. (title 21, United States Code, section 846.)

SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Defendant stated that he had nothing to say. As shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and sentenced defendant to be committed to the custody of the Attorney General or his authorized representative for a term of THREE YEARS, pursuant to section 3551 of Title 18, United States Code, as amended, with provision defendant be confined in a Federal Reformatory for a period of SIX(6) MONTHS, as provided in the said section. On each of counts 1 & 3 to run concurrently with the term of imprisonment. Execution of the remainder of the sentence is suspended.

-AND-

pursuant to the provisions of title 21, section 841, U.S.C., defendant is placed on Special Parole for a term of THREE YEARS to commence upon the expiration of confinement.

SPECIAL
CONDITIONS
OF
PROBATION

Defendant continued on Bail pending Appeal, on condition that Appeal be filed expeditiously and all rules of the court are complied with.

MICROFILM

NOV 20 1975

ADDITIONAL
CONDITIONS
OF
PROBATION

In addition to the special conditions of probation herein set forth, defendant shall be subject to the provisions of the Federal Probation Act, 18 U.S.C. § 3601, et seq., and shall be subject to the provisions of the Federal Probation Act, 18 U.S.C. § 3601, et seq., and shall be subject to the provisions of the Federal Probation Act, 18 U.S.C. § 3601, et seq.

The court orders commitment to the custody of the Attorney General or his authorized representative for a term of THREE YEARS, pursuant to section 3551 of Title 18, United States Code, as amended, with provision defendant be confined in a Federal Reformatory for a period of SIX(6) MONTHS, as provided in the said section. On each of counts 1 & 3 to run concurrently with the term of imprisonment. Execution of the remainder of the sentence is suspended.